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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review	)	
for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Transport Rate Structure	)	CC Docket No. 91-213
and Pricing	)	
	)	
End User Common Line Charges	)	CC Docket No. 95-72

OPPOSITION OF BELLSOUTH TO PETITION FOR RULEMAKING OF CONSUMER FEDERATION OF AMERICA, INTERNATIONAL COMMUNICATIONS ASSOCIATION AND NATIONAL RETAIL FEDERATION

BellSouth Corporation and BellSouth Telecommunications, Inc. (hereinafter collectively "BellSouth") hereby submit their Opposition to the Petition for Rulemaking filed by Consumer Federation of America, International Communications Association and National Retail Federation (hereinafter collectively "CFA") on December 9, 1997.

I. INTRODUCTION

CFA requests the Commission to initiate a rulemaking proceeding for the purpose of an "immediate prescription of interstate access rates to cost-based levels."[1] It contends that, although the Commission adopted a market-based approach for regulation of access charges in its Access Reform Order,[2] that choice was premised upon the development of competition at a

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[1] CFA at 2.

[2] In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges, CC Docket Nos. 92-262, 94-1, 91-213 and 95-72, *First Report and Order*, FCC 97-158, 12 FCC Rcd

more rapid pace and to a greater degree than is occurring or can be expected to occur and that, in the absence of such competition, a rulemaking is needed now to prescribe access charge rate levels at lower "cost-based" levels.

The Commission should view the CFA Petition for what it is: an untimely petition for reconsideration of the Access Reform Order. CFA simply disagrees with the Commission's choice of a market-based approach to regulation of access charges. Moreover, the premise underlying CFA's Petition, that competition is not developing at the pace the Commission believed to be necessary in order to merit a market-based approach, is erroneous. Finally, the Commission must, in any event, refrain from prescribing access rates for important legal and policy reasons. For all of these reasons, the Petition must be denied.

II. THE CFA PETITION IS AN UNTIMELY PETITION FOR RECONSIDERATION OF THE COMMISSION'S PREVIOUS DETERMINATION TO ADOPT A MARKET-BASED APPROACH

In the Access Reform Order, the Commission made a deliberate choice between use of a market-based approach and a variety of prescriptive approaches to regulating access service charges during a transition toward full reliance upon competition for such regulation. Making a decisive choice for the former, the Commission explained as follows:

> We decide that adopting a primarily market-based approach to reforming access charges will better serve the public interest than attempting immediately to prescribe new rates for all interstate access services based on ... cost.... Competitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production. Accordingly, where competition develops, it should be relied upon as much as possible to protect consumers and the public interest. In addition, using a market-based approach should minimize the potential that regulation will create and maintain

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15982 (1997), review pending sub nom. Southwestern Bell Tel. Co. v. FCC, Nos. 97-2866, -2873, -2875, -3012 (8th Cir.) ("Access Reform Order").

> distortions in the investment decisions of competitors as they enter local telecommunications markets....[3]
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> . . .
>
> Prescribing ... rates would be the most direct, uniform way of moving ... rates to cost. But, precisely because of its directness and uniformity, rate regulation can only be, at best, an imperfect substitute for market forces. Regulation cannot replicate the complex and dynamic ways in which competition will affect the prices, service offerings, and investment decisions of both incumbent LECs and their competitors.....A market-based approach to rate regulation should produce, for consumers of telecommunications services, a better combination of prices, choices, and innovation than can be achieved through rate prescription. A market-based approach ... is thus consistent both with the pro-competitive, deregulatory goals of the 1996 Act and with our responsibility under Title II, Part I of the Communications Act to ensure just and reasonable rates.[4]

CFA now challenges this determination to rely upon a market-based approach for the sole reason that, in its view, the premise underlying the Commission's decision regarding the timeframe within which competition is and will develop is not borne out by the facts. CFA, however, has an erroneous impression both of the Commission's view regarding the extent of competition needed in order to justify a market-based approach as well as the current status of competitive developments.

First, CFA's judgment regarding the state of local competition and efforts by the incumbent local exchange carriers ("ILECs") to meet the requirements of the 1996 Act are totally distorted. Indeed, a recent study of competitive developments in the local exchange arena indicated that there already is substantial competition in the local telephone market, albeit mostly aimed at business customers.[5] Members of the Commission recently observed that local

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[3] Access Reform Order at ¶ 263.

[4] Id. at ¶ 289.

[5] Huber, Peter, "Local Exchange Competition Under the 1996 Telecom Act, Red-Lining the Local Residential Customer," filed with the Commission on November 5, 1997 by SBC Telecommunications. Huber contends that allowing ILECs to enter the long distance market will bring about full competition in the local exchange arena. In addition, as BellSouth discusses in

competition appears to be developing in the very manner contemplated by the Act. For instance, Commissioner Furchtgott-Roth stated, in an en banc hearing on the status of local competition, as follows:

> ...I leave this en banc hearing today with great faith that the Act is in fact working; that we see that there are many different approaches. Some will work, some may not work, but that ultimately the Act is working, and I think that we have ample testimony of that today.[6]

Commissioner Ness has indicated that she shared this "sense of optimism,[7] Commissioner Powell indicated he was "very, very encouraged by the hearing," and Chairman Kennard echoed this view.[8] Commissioner Tristani stated as follows:

> ... I am delighted that businesses are seeing those fruits [of local competition] earlier but what pleases me today is that I am seeing some targeting of residential consumers....[9]

The degree to which competitors have entered a particular market segment is not due to the failure of BellSouth to meet its obligations under the 1996 Act, as CFA apparently believes, but, rather, is the result of their own independent decisions. BellSouth, and other ILECs, have deliberately and conscientiously engaged in those processes required under the 1996 Act to open

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Section III, infra, the development of residential competition can be accelerated if the Commission were to move more quickly to develop a sufficient, explicit high cost support fund for residential services for all providers.

6 En banc Commission hearing held January 29, 1998 pursuant to Public Notice, "FCC to Conduct January 29 Presentation on Status of Local Telephone Competition," released January 22, 1998

7 Id. "[T]he fruits of our labors are beginning to show," she stated.

8 Id. Chairman Kennard also expressed optimism at his press conference on the "Second Anniversary of the Telecommunications Act of 1996 and Priorities for 1998," January 30, 1998.

9 Id.

their networks to competitors.[10] Recent litigation regarding requirements under the 1996 Act have not had the purpose of hindering competition but merely of assuring that the relevant statutory provisions enacted by Congress are interpreted and applied as intended.

That competition has not developed even further than it has does not provide a basis for the immediate prescription of access charges which CFA seeks. In the Access Reform Order, the Commission indicated its belief that substantial competition would develop over time. The Commission provided a transitional period within which the market-based approach would be allowed to operate, with a protective backstop of prescription not scheduled until the year 2001 for rates not then subject to substantial competition, "in order to give competition sufficient time to develop substantially...."[11] This transition period would permit the changes adopted by the Access Reform Order and those rule changes to be adopted in universal service proceedings to be implemented and taken into account by all interested parties, including competitors as well as ILECs,[12] and would allow the "pro-competitive regime created by the 1996 Act" to take root.[13] The Commission indicated its expectation that implementation of the 1996 Act would "generate competition over the next few years,"[14] and it described its general plan to backup its market-based approach with prescription "if competition fails to emerge over time."[15]

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[10] As of the end of calendar year 1997, there were 437 wireline competitive LEC certifications which had been approved by state commissions in BellSouth's nine-state operating territory, 302 interconnection and resale agreements, 9,276 unbundled loops and 218,045 resold lines.

[11] Id. at ¶ 268.

[12] Id.

[13] Id. at ¶ 269.

[14] Id. (emphasis supplied).

[15] Id. at ¶ 260 (emphasis supplied).

While the Commission did indicate, as CFA mentions, that it would require submission of cost studies prior to the end of the three-year transition period "if competition is not developing sufficiently for [a] market-based approach to work,"[16] any belief that such an evaluation can be made at this point in time ignores the Commission's own view regarding the foregoing timeframes. The Commission adopted the market-based approach only eight months ago. The Access Reform Order simply cannot be read to support the view that a prescriptive approach should be adopted if competition has not developed to the extent CFA believes it should have within these few months. Indeed, the Commission has not yet even adopted the specific rules under which its market-based approach will operate, such as the timing and degree of the relaxed regulation and pricing flexibility it has in mind, including the specific competitive triggers for such. Even once the Commission adopts its market-based rules, those rules will not provide for deregulation of access services and charges immediately "but will implement deregulation in steps, as competitive conditions warrant."[17]

Moreover, no party has had the opportunity to evaluate the impact of either the implementation of the Commission's new access reform rules or of the elimination of the major portion of implicit universal service subsidies, factors which the Commission believed would have a favorable impact upon the development of competition. This is because the bulk of the access reform rules have only just now been implemented through recent tariff filings which took effect earlier this month.[18] Additionally, revised rules regarding the size and sufficiency of a

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16 Id. at ¶. 267.

17 Id. at ¶ 273.

18 Tariffs Implementing Access Charge Reform, CC Docket No. 97-250, *Memorandum Opinion and Order* (DA 97-2724), rel. December 30, 1997.

high-cost universal service fund will not be implemented until January, 1999.[19] Indeed, the current access rates presently contain a considerable amount of implicit support for universal service, especially for residential local exchange service rates. Once the Commission develops a sufficient and explicit high cost fund, access prices should be reduced by a substantial amount and competition for residential local exchange service customers should increase significantly.

As can be seen, CFA's Petition ignores both the extent to which competition is developing as well as the Commission's clearly stated recognition that a market-based approach is appropriate now. Although CFA characterizes its request as a Petition for Rulemaking, the Commission should reject the Petition because it is, in essence, a request for reconsideration of this view and, as such, is too late.[20]

III. THE COMMISSION MUST REFRAIN FROM ADOPTING A PRESCRIPTIVE APPROACH

The Commission should continue to refrain from adopting a prescriptive approach for important legal and policy reasons.

The Communications Act of 1934, as amended (the "Act"), provides for a prescription of rates only upon a finding that the rates currently being charged "[are] or will be in violation of any of the provisions" of the Act.[21] There has been no finding that access charges as a whole at

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19 Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, FCC 97-157, 12 FCC Rcd 8776 (1997) ("Universal Service Order") at ¶ 203.

20 47 C.F.R. Section 1.429(d).

21 47 U.S.C. Section 205(a) In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, *Third Report and Order*, 93 F.C.C. 2d 241, 256 (1983) at ¶ 44.

their present rate levels are illegal. On the contrary, rates which comply with the Commission's price cap rules are presumed lawful in the aggregate.[22]

Moreover, CFA presents nothing that should cause the Commission to alter its chosen course of following a market-based approach, as a matter of policy. This choice properly recognizes the pro-competitive benefits, the market efficiencies, the encouragement to innovate, and ultimate benefits to consumers which the former approach can provide as compared to any benefits which an inflexible prescriptive approach might be viewed as providing.

As the Commission has observed, a prescriptive reduction in access charges could have a chilling effect on the incentive for ILECs to make infrastructure investment and develop new and innovative service offerings now and in the future. This would be in direct contrast to the Congressionally-mandated requirement that the Commission find ways in which to encourage such investment and innovation.[23]

Additionally, a prescription of access charges to lower levels at this point in time would preclude ILECs from recovering their total interstate costs, absent an alternative means for recovery of historic costs and universal service support presently included in access charge recovery mechanisms. A denial to ILECs of a means of recovery of such amounts would raise serious legal, public policy and competitive concerns. No such alternative mechanisms presently exist.

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[22] In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, *Second Report and Order*, 5 FCC Rcd 6786, 6836 (1990) at ¶ 460.

[23] See, e.g., Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Section 706(a).

For instance, ILECs presently have significant depreciation reserve deficiencies which they must be allowed to recover due to the fact that depreciation rates have been set too low in the past. A means for completing the recovery of such amounts, as well as the full costs of providing service, is essential in order to avoid confiscation.

A reduction in access charges prior to the establishment of a neutral and non-discriminatory high cost universal service fund could also raise similar concerns. Moreover, such an approach could stymie the efforts of competitive providers to make substantial inroads into the residential service market. Given that ILECs' access charges presently provide substantial support for the cost of residential services, enabling the maintenance of lower residential rates, competitors will find it difficult to compete for residential customers. Once a high cost fund is properly established, it would provide both for a reduction in access charges as well as for the necessary support mechanism for ILECs and their competitors alike, enabling the continued provision of residential local exchange service at affordable rates.

Finally, the continuation of a market-based approach will not harm the public, as CFA implies. Under the market-based approach, as described by the Commission,[24] the existing price cap and access charge rules remain in place, until removed over time for those services subject to sufficient competition. Such rules "are designed to ensure that access charges remain within the 'zone of reasonableness' defining rates that are 'just and reasonable.'"[25] Indeed, the Commission's entire price cap regime was designed to emulate the results which would occur in a competitive marketplace. If anything, the Commission's continuation of a price cap approach,

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[24] Access Reform Order at ¶¶ 260, 264.

[25] Access Reform Order at ¶ 273.

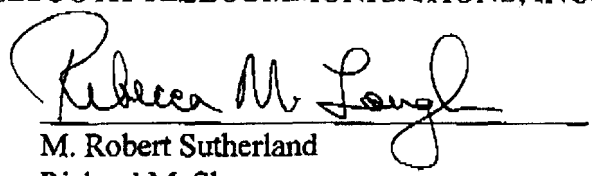
rather than a swift move to deregulation, results in a market which is less efficient and has fewer benefits for consumers than would be the case if ILECs were allowed to operate in the same deregulatory mode as their competitors. In urging the Commission to move immediately toward a prescription of lower access charges, CFA ignores this fact.

IV. CONCLUSION

For all of the foregoing reasons, the Commission should deny the CFA Petition. The Petition is an untimely request for reconsideration of the Access Reform Order and, moreover, presents a distorted view of the nature and status of competitive developments. Finally, important legal requirements and policy considerations preclude the adoption of the prescriptive approach which CFA seeks.

Respectfully submitted,

BELLSOUTH CORPORATION
BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

M. Robert Sutherland
Richard M. Sbaratta
Rebecca M. Lough

Their Attorneys

Suite 1700
1155 Peachtree Street, N. E.
Atlanta, Georgia 30306-3610
(404) 249-3390

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